

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT Z-109 5012-D3
Issued to: Andrew Curtis REED

and
MERCHANT MARINER'S DOCUMENT Z-423 30 0165-D4
Issued to: J. W. CARR

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

2176

J. W. CARR
Andrew Curtis REED

These appeals have been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By orders dated 22 September 1977, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, suspended Appellants' seaman's documents each for six months on twelve months' probation, upon finding each guilty of misconduct. The specifications found proved allege that while serving on board SS JEFF DAVIS under authority of the documents above captioned, on or about 9 December 1976, each Appellant wrongfully created a disturbance by engaging in a fight with the other.

The hearings were held in joinder at New Orleans, Louisiana, on several occasions, from 15 February 1977 to 7 September 1977.

At the proceedings each Appellant was represented by professional counsel and entered a plea of not guilty to the charges and specifications.

The Investigating Officer introduced in evidence the testimony of one witness, obtained by deposition on written interrogatories, and voyage records of JEFF DAVIS.

In defense, each Appellant testified in his own behalf. The Administrative Law Judge obtained and entered in evidence on his own motion the testimony of another witness by deposition on written interrogatories.

After the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charges and specifications had been proved. He then entered orders suspending all documents issued to Appellants for a period of six months on twelve months' probation.

The decisions were served on 24 and 29 September 1977. Appeals were timely filed.

FINDINGS OF FACT

On 9 December 1976, Appellants were serving as able seaman and fireman-watertender, respectively, on board SS JEFF DAVIS and acting under authority of their documents while the vessel was in the port of Karachi, Pakistan.

At about 0950 of that morning, after Appellants had been engaged in all-night gambling at cards with one J. D. Hill, another crewmember, a disturbance in the crew quarters was reported to the master and chief mate. A check made at that time disclose nothing unusual. Shortly before 1100 another report was made to the chief mate that some of the crew were fighting.

The chief mate and third mate proceeded to the crew quarters when they first saw Appellant Reed lying on the deck in the thwartships passageway, with contusions on his face and head. While Reed was being attended by the third mate, the chief mate found Appellant Carr on his feet nearby, bleeding from wounds on his right side. No weapon of any kind was seen in the area.

Both Appellants were fined a day's pay each for "fighting." Appellant Reed responded to the reading of the log entry with, "I don't know who hit me." Appellant Carr made no comment when advised of the log entry imposing the fine.

BASES OF APPEAL

Appeals have been separately taken from the orders imposed by the Administrative Law Judge. It is contended by each Appellant that the evidence does not support the findings.

APPEARANCE: Jonathan M. Lake, Esq., New Orleans, Louisiana, for Appellant Carr; Sanders & Sanders, by Rex Woodard, Esq., Beaumont, Texas, for Appellant Reed.

OPINION

I

The only finding of fact made by the Administrative Law Judge in each case is a statement repeating the words of the specification, in essence reciting that each person "wrongfully created a disturbance aboard the vessel by engaging in a fight" with the other person.

The eleven pages of "opinion" that follow paraphrase the testimony given and the contents of documents, assess the credibility of witnesses and reliability of the evidence, and discuss the conflicts in the testimony, chiefly that of the Appellants. One factual conclusion is drawn: "There is no doubt that the...[Appellants] created a disturbance on the SS JEFF DAVIS on 9 December 1976 by engaging in a vicious fracas resulting in severe injuries to both of them."

An Administrative Law Judge is required to render an initial decision consisting of, inter alia, findings of fact, "including necessary evidentiary and ultimate facts pertaining to each specification." 46 CFR 5.20-155(a)(1). Here, not even the "fact" of injury, referred to in the opinion, is "found" as a fact as such, and no other aspect of "the fight" or of the "disturbance" are found.

II

Prior to the taking of evidence in this case, the originally preferred allegations against each of assault and battery upon the other person were amended to allege only wrongful creation of a disturbance by engaging in a fight with the other person. It is well at the outset to provide a general caveat for matters like this.

There can be no real doubt that fighting aboard ship creates, almost necessarily, a disturbance, and that fighting among members of the crew is disruptive of discipline and efficient operation of the vessel beyond the immediate episode, which may have been otherwise contained. Because of the well known and long recognized law of assault and battery and of legitimate self-defense, it is necessary that a trier of facts in cases touching such activities be acutely aware of the balances that must be maintained.

Many otherwise excusable actions create disturbances aboard a vessel, and disturbance, as such, is not misconduct, nor is "creating" a disturbance misconduct unless the word is understood with an extensive gloss, which, in fact, does not exist. The allegation here is, however, acceptable because it speaks of "wrongful" creation of the disturbance. The "wrongfulness" is of the essence if there is misconduct here. The allegation was further made more definite by declaring that the "wrongful disturbance" consisted of engaging in a fight.

"To engage in a fight" may in colloquial use import reprehensible conduct generally, but in the context of the law of personal violence it is a neutral expression. It is easily seen that there will be, in the impartial view of a latecomer to the

scene, a "fight" in progress if two persons are engaged in fisticuffs. There will probably also be a disturbance; most often that is what brought the third party witness to the scene. From these bare facts above, however, while "misconduct" is undoubtedly present, there is no ascertainable blame or fault as to either of the participants.

It is always possible, if not probable, under circumstances such as appeared here, that one or the other of the parties was an aggressor. If one is the assailant the other is vested with the right of self-defense. It is true that there are limitations on the exercise of this right. To overstep the limitations is to constitute one's self an assailant. What began as assault and battery of one upon another can grow into what is essentially mutual assaults and batteries. When this occurs the testimony of a third person witness who has late arrived is frequently of little value.

He may be able to report only an ongoing fight, commenced before his arrival and terminated, often, by his arrival. Before either party could be found, on the basis of the testimony of only one such witness, to have engaged in a voluntary "fight" there would have to be discernible features of the conduct which could reasonably lead to a belief that more than mere self-defense was involved on the part of the participant in question. If this is the result obtained there must be identified specific elements of the conduct as the basis of the inference. Specific examples need not be produced for discussion; it appears that such elements are not present here.

III

What was presented in this case was the testimony of the two persons separately charged with engaging in a fight. Their descriptions of the events are completely at variance with each other and they are so incompatible that if one specific of the story of either one is taken as true the other must be completely rejected. The Administrative Law Judge, on his own motion after the Investigating Officer had rested his case, obtained and introduced into evidence the testimony of a third person on written interrogatories, a person who had undeniably been present in the quarters in which the episode occurred. Neither Appellant objected to this action. While this testimony was more nearly like that of one of the Appellants than the other's, the Administrative Law Judge characterized the testimony of all three in these words: "none of their accounts of the incident can be considered as accurate."

Apparently recognizing that this necessitated a rejection of

all the testimony of the three persons present when the episode began, the Administrative Law Judge goes on:

"The log entries and the statements of the unbiased witnesses constitute reliable, probative, and substantial evidence. The charges against...[both persons] are proved."

The first statement here is soundly correct. But, the log entries and the substantial evidence of the unbiased witnesses prove only that there had been an encounter of violence between the two men. When the "unbiased witnesses" arrived at the scene one Appellant was lying on the deck, injured. The other was found, in a loud controversy of some kind with another crewmember, also in an injured state. None of these witnesses was present at a time when combat was in progress.

That there was in fact combat, i.e., a fight, can easily be inferred from the fact that both participants suffered injury, there being not the slightest hint that a third party participant was involved. The one situation that can be justifiably rejected is that of Appellant Reed, that he was initially struck a blow from behind that "knocked him out." Blows were struck by both on each other. Each person claimed, however, to have been the victim of assault and battery and to have acted only in legitimate self-defense or not to have acted at all. It appears that the Administrative Law Judge, in rejecting specifically the testimony of Appellants, also determined that their separate claims of self-defense were meritless. However, because the "opinion" of the Administrative Law Judge is little more than a rehash of evidence admitted during the hearing, it is by implication only that a finding that neither was acting in self-defense might be made and sustained. In a case of this nature, where the issue of self-defense squarely is raised, the issue should be deemed "material" and therefore addressed "with [sufficient] specificity," rather than by implication alone. 46 CFR 5.20-155(a)(4).

IV

Consideration may be given to the fact that Appellant Reed's testimony must be rejected. The reason is, of course, that the injuries to Appellant Carr establish conclusively that Reed was not knocked unconscious by an unseen blow at the outset. That Reed was not telling the truth does not establish the contrary of what he said. There must still be substantial evidence that he voluntarily participated in the "fracas." Decision on Appeal Nos. 894, 1563. This evidence cannot be provided by the "unbiased" witnesses since neither observed any part of the actual encounter. It can be provided of course by the other participant but that testimony was

expressly rejected by the Administrative Law Judge.

Since the Administrative Law Judge saw fit to reject the testimony of both participants, and only by implication can it be said that he relied upon an inference that Appellants voluntarily agreed to engage in a fight, I am not inclined to function as trier of facts and reweigh the evidence as if on first hearing. It is possible that the testimony of the third person present could be utilized to support findings adverse to one or the other or both the parties, but that evidence also was expressly characterized as unreliable. With the exclusion of the evidence given by the three persons present at the time of the incident and the failure to accord any weight even to portions of the testimony of one or more of those persons, reflected in the absence of findings as to what, if anything, occurred, there is established on this record no "wrongful" creation of a disturbance by any person. That there was a fight cannot be doubted. That either party wrongfully initiated the combat or that either party willingly participated other than as a victim of aggression is not established upon the only evidence held by the Administrative Law Judge to be reliable, the statements made by two spectators who saw only what was to be seen after the fighting was over.

ORDER

The order of the Administrative Law Judge dated at New Orleans, Louisiana on 22 November 1977, are VACATED, the findings are SET ASIDE, and the charges are DISMISSED.

R. H. SCARBOROUGH
VICE ADMIRAL, U. S. COAST GUARD
Vice Commandant

Signed at Washington, D.C., this 3rd day of Jan. 1980.

Proof

not established by rejection of defense

Self-defense

fighting

Testimony

rejection of does not prove opposite

Witnesses

ALJ calling on own motion